Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

HARRY E. PIERCE,

Petitioner,

vs.

SHIRLEY S. CHATER,
Commisioner of Social Security,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTIONS PRESENTED

I. Certiorari should be granted to clarify whether a determination by the United States Department of Labor that an individual is totally disabled under the Federal Worker's Compensation Act must be accorded great weight in a subsequent proceeding for disability insurance benefits under the Socoal Security Act

PARTIES TO THE PROCEEDING

Petitioner, Harry E. Pierce, is a resident of Tampa, Florida. He was the Claimant before the agency proceedings below, Plaintiff in the lower court proceedings of this case, and was the Appellant before the United States Court of Appeals for the Eleventh Circuit.

Respondent, Shirley S. Chater, is the Commissioner of Social Security. Pursuant to the provisions of section 106(d) of the Social Security Independence and Program Improvement Act of 1994, (Public Law Number 103-296), the former function of the Secretary of the U.S. Department of Health and Human Services in Social Security cases was transferred to the Commissioner, effective March 31, 1995. While the underlying proceedings were originally brought against the Secretary, for the sake of clarity, the Respondent herein is frequently referred to as the Commissioner. Thus, the Commisioner was the Appellee before the Eleventh Circuit Court of Appeals, and the Defendant in the district court below.

There are no other parties to this proceeding.

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In The

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October Term, 1995

HARRY E. PIERCE,

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SHIRLEY S. CHATER,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On February 23, 1996, the United States Court of Appeals for the Eleventh Circuit issued its opinion, (1a) affirming per curiam the decision of the district court below. Pursuant to Eleventh Circuit Rule 36-2, and Internal Operating Procedure 5 of that Rule, that opinion was not published.

The order underlying that appeal was entered on November 14, 1994, by the Honorable Elizabeth A. Kovachevich, District Judge, United States District Court for the Middle District of Florida. (3a) That order adopted and incorparated by reference the Report and Recommendation of United States Magistrate Judge Elizabeth A. Jenkins, (5a) which recommended that the Commissioner's final decision denying Petitioner's claim for social security disability insurance benefits be affirmed.

STATEMENT OF JURISDICTION

Petitioner seeks to invoke this Honorable Court's discretionary jurisdiction to review the opinion of the United States Court of Appeals for the Eleventh Circuit and its judgment of February 23, 1996. That opinion affirmed per curiam the district court's entry of judgment in favor of the Respondent, and which affirmed the administrative decision of the Commissioner to deny Petitioner's application for social security disability benefits. Petitioner invokes the certiorari jurisdiction conferred upon this Court by 28 U.S.C. § 1254(1).

STATUTE(S) INVOLVED

42 U.S.C. § 243(d) in relevant part provides:

(1) The term "disability" means-

(A) inability to engage in any substantial ganiful activity by any reason of any medically determinable physical or mental impairment which can be expected to last for a continuous period not less than 12 months

* * *

(2) For purposes of paragragh (1)(A),

(a) An individual shall be determined to be under a disability only if his physical or metal impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy...

STATEMENT OF THE CASE

After receiving a medical discharge from a brief period of service in the United States Marine Corps, the Petitioner, Harry E. Pierce, gained employment as an electrician with the Tennessee Valley Authority. He was assigned to the construction of the Watts Bar Nuclear Power Plant located in Spring City, Tennessee.

On February 8, 1977, Petitioner, who was 40 years of age at the time, fell while climbing an assembly of scaffolding at the power plant, and sustained significant injuries to his right knee. During this accident, he also injured his shoulder and re-aggravated an existing back injury, and thereafter, suffered generally from radiating pain throughout his back and extremeties. Significantly, Petitioner had previously injured his right knee in 1953, resulting in the surgical removal of cartilidge from within the knee.

The followng day, Petitioner was seen by a physician, Dr. Wallace Grissom, whose diagnosis included a finding that Petitioner had suffered a right knee sprain with traumatic effusion, and who opined that this injury would restrict Petitioner from performing any work involving standing or walking.

In light of these injuries and resulting disability, Petitioner returned to his home in Tampa, Florida, in order to recouperate with the assistance and support of his family. Having timely reported this accident to his employer, Petitioner filed a claim for benefits under the Federal Employee's Compensation Act ("FECA"), Title U.S.C. section . Petitioner immediately began to receive compensatory benefits, including "continuation pay" from February 9th through March 25, 1977.

Petitioner was referred for treatment to Dr. Donald Keller,

a Tampa orthopaedic surgeon, who examined Petitioner in late March, 1977, and found him to be temporarily totally disabled. Lunseth referred Petitioner to several other area surgeons for evaluation and treatment, including Dr. Paul A. Lunseth, who began primary care and treatment of Petitioner's injuries in April, 1977. Lunseth performed both arthroscopy arthrotomy, which revealed significant internal derangement of the knee, coupled with the presence of degenerative athritis. While Lunseth opined that atotal knee replacement was indicated, he did not recommend such in light of petitioner's age and level of work activity. Alternatively, Lunseth recommended that Petitioner undergo additional surgery -- a valgus osteotomy.

Petitioner underwent the osteotomy surgery a few months later but continued to suffer from dibilitating pain stemming from his knee. While both Drs. Keller and Lunseth were optimistic (pre-surgery) that Petitioner would recover and return to the workforce, Petitioner continued to suffer from pain throughout the year following surgery, and was found by the treating physicians to be totally disabled. From March 25, 1977, through October, 1980, petitioner continued to receive compensation for total temporary.

On October 7, 1980, the Office of Workers' Compensation Program issued Petitioner a schedule award for a 36 percent disability loss of use of his right leg, for the period from September 11, 1980, through September 6, 1982. In January, 1983, this award was reduced to temporary partial benefits, based upon a finding that Petitioner had developed the ability to perform the duties of an office clerk. Petitioner administratively appealed that decision to the Employee's Compensation Appeals Board, and in October, 1983, the Board reversed the reduction decision. The reversal was based on the Board's finding that there had not been any showing that Petitioner possessed the ability to engage in such sedentary activities, and that there was conflicting evidence regarding the onset of Petitioner's

psychological impairments associated with, and stemming from, his 1977 accident.

On July 28, 1986, Petitioner filed an application for for disability insurance benefits, alleging that such disability commenced on the date of his accident, February 8, 1977. This claim was denied on initial determination on August 8, 1986, and Petitioner's subsequent request for reconsideration was likewise denied on August 29, 1986.

On March 21, 1988, Petitioner filed a second application for benefits, which was denied at the initial and reconsideration review level, on the ground that the second application was barred under the equitable doctrine of res judicata. Petitioner timely requested an administrative hearing, which was conducted on December 20, 1988, by Administrative Law Judge (ALJ) Charles P.Lockwood. Petitioner was represented by counsel at the hearing, and provided testimony as to his disability. Futher, vocational expert James Finley appeared and testified.

On February 16, 1989, ALJ Lockwood issued his decision finding that Petitioner was not under a "disability," as defined in the Social Security Act, at any time prior to June 30, 1982, the expiration date of his insured status for Title II benefits. Petitioner's request for review to the Appeals Council was denied on October 25, 1989, and ALJ Lockwood's decision was left standing as the final decision of the Secretary.

On December 22, 1989, Petitioner filed a complaint in the United States District Court for the Middle District of Florida, seeking judicial review of the Secretary's final decision, pursuant to Title 42 U.S.C. § 405(g). Therein, he argued that the Secretary had erred in denying his claim for benefits.

On December 28, 1990, Magistrate Judge Jenkins

recommended that the case be remanded to the Secretary for several reasons, including the fact that the AALJ had failed to accord the proper weight to the DOL's finding that Petitioner was disabled, and that the DOL records were apparently not provided to the ALJ.

ALJ Lockwood conducted a new hearing on April 19, 1991, and after considering additional documents, he issued a new decision on May 20, 1991, again finding that Petitioner had not been "disabled" within the meaning of the law prior to the expiration of his disability insured status on June 30, 1982. According to the ALJ,

Subsequently, the Appeal Council denied Petitioner's timely appeal of the ALJ decision, and the Secretary filed a transcript of the supplemental hearing with the district court. At a status conference conduected by Magistrate Judge Jenkins on May 15, 1992, Petitioner demonstrated that Department of Labor had yet to provide the entire record of his worker's compensation claim.

Underlying Petitioner's claim regarding the DOL's failure was the March 28, 1989 letter of Dr. Lunseth, wherein he unambiguously stated that not only had DOL failed to authorize the release of such records, but that DOL had "told us specifically not to release any records to anybody for any reason." As the Secretary stipulated to these facts, Jenkins recommended that the decision denying Petitioner benefits be reversed, and the case be remanded for a second time. The purpose of the second remand was to require the Secretary to consider the DOL's disability determination and all records pertinent to that determination, which records Jenkins recommended that the district court order DOL to disclose.

By order of June 16, 1992, the district court adopted and confirmed Magistrate Jenkins R & R, and thereby remanded the case to the Secretary to consider the DOL's disability

determination, with directions that DOL "cooperate fully" by releasing the records sought by Petitioner. The Appeals Council thereafter vacated its prior denial of review, and again ordered the case remanded to the ALJ to effectuate the district court's order.

On remand, ALJ Andrew Rodnite conducted a supplemental hearing on November 10, 1992, at which Petitioner appeared and testified. No further information was received from the DOL which would have explained the rationale or decision-making with regard to DOL's total disability finding. Additional medical evidence was introduced by Petitioner. ALJ Rodnite found the majority of these records to be cumulative or duplicative of the existing record regarding Petitioner's musculoskeletal injuries.

The remaining portion of the newly submitted record was related to Petitioner's psychological problems. These included numerous letters from a psychiatrist who had treated Petitioner subsequent to the expiration of his insured status. On January 23, 1993, ALJ Rodnite enter his decision that Petitioner was not entiotled to benefits, as he was not "disabled" within the menaing of the law. The ALJ found that DOL's determination that Petitioner was totally disabled after his 1977 accident did not preclude Petitioner from engaging in sedentary work. Petetioner's request for review to ther Appeals council was later denied, and the supplmental transcript was filed with the district court.

On October 24, 1994, Magistrate Judge Jenkins issued her Report and Recommendation, wherein she recommended that the Secretary's decision denying Petitioner benefits be affirmed. (5a) As to the issue regarding the DOL's finding that Petitioner was "totally disabled" prior to the expiration of his insured status, the Magistrate found that the ALJ, while not articulating the differences between the standards employed by DOS and

Social Security to determine whether an individual is disabled, (13a) had correctly found that the two standards were "significantly different." *Id.* Further, despite binding precedent in the Eleventh Circuit which requires a reviewing court and Social Security to accord "great weight" to the disability findings of another agency, Jenkins nonetheless found that the ALJ's application of an "ordinary weight" standard to DOL's total disability finding was correct. (14a)

On November 14, 1994, U.S. District Judge Elizabeth Kovachevich entered an order adopting and incorporating the Magistrate's Report andf Recommendation. (3a) Therein, Judge Kovachevich simply agreed with the Magistrate's findings, without comment or explanation. (4a)

In its decision affirming this order, the Eleventh Circuit provided no explanation as to the basis for its decision, (1a) other than to say that substantial evidence supported the decision to deny Petitioner's claim. (2a) Petitioner timely seeks relief from this silent but damaging decision.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted to clarify whether a determination by the United States Department of Labor that an individual is totally disabled under the Federal Worker's Compensation Act must be accorded great weight in a subsequent proceeding for disability insurance benefits under the Socoal Security Act

In reaching its decision to deny Petitioner disability insurance benefits under Social Security, the Respondent accorded only "ordinary weight" to the decision of the U.S. Department of Labor in its previous determination that Petitioner was unable to engage in work activity because of his significant impairment. This was error, and Petitioner respectfully requests that this Honorable Court exercise its jurisdiction to correct.

It is well-settled in administrative jurisprudence that the disability determinations of other agencies or departments of the U.S. Government *must be* given greight weight unless there is good cause not to do so. *Falcon v. Heckler*, 732 F.2d 827 (11th Cir. 1984); *Walden v. Schweiker*, 672 F.2d 835, 840 (11th Cir. 1982). Thus, where, as here, an individual applicant relies upon the diability determinations of another federal agency, the burden rests with the government to demonstrate that the determination is not entitled to "great weight."

In the instant case, the Government failed to meet this burden. First, the Magistrate Judge readily admitted that upon the most remand of this case to the ALJ to determine the standards which were used in the DOL's decision-making process, the ALJ failed to make such findings. (13a) Given the clear directions of the District Court Judge in her remand order,

the ALJ was to identify those standards used in the DOL's process, in order to determine the scope and extent to which they were either similar or different than that used by the Commissioner in the Social Security disability determintaion process.

Second, the Magaistrate's finding that DOL's award of a 36% permanent partial loss award to Petitioner did not implicate that he was disabled within the meaning of the Social Secuirty Act is equally faulty. In each of the DOL documents submitted by Petitioner to the Commissioner, the DOL clearly referred to his impairment as totally disabling.

Underlying the numerous administrative decisions, the reports and recommendations and the district court orders is the simple fact that Petitioner's injuries were significant and prevented him from engaging in a full range of work prior to the expiration of his insured status. In the Eleventh Circuit, such claimant will be found to be unable to perform a full range of work were he cannot perform work that requires prolonged standing or walking, or repetitive bending or stooping. *See e.g., Walker v. Bowen*, 826 F.2d 996, 1003 (11th Cir. 1987).

Despite Petitioner's demonstration that he was physically incapable of bending and sitting for any length of time, the Commissioner arbitrarily found that he could perform sedentary work activity. Thus, it is evident that his inability to perform a full range of work during his period of disbality should prevent the Secretary from reaching this finding. Given the fact that the administrative record is replete with evidence that Petitioner suffered continuing pain, both exertional and non-exertional, coupled with a significant injury to his weight bearing extremity, there is simply no substantial evidence underlying the Commisioner's decision, and accordinghly, it should be vacated.

It is black letter law that the proper interpretation of the

Social Security Act's disability provisions favor coverage, not exclusion. Rasmussen v. Gardner, 374 F.2d 589, 592 (10th Cir. 1967). In the instant circumstances, this long-standing policy should be applied to reach the only result that is just -- the disability determination of the DOL should have been accorded great weight by the Commissioner, and Petitioner's claim for disability insurance benefits should have been granted.

CONCLUSION

For these reasons, Petitioner submits that this Honorable Court should accept jurisdiction in this case to correct the injustice imposed below. Petitioner was totally disabled under a proper determination by the U.S. Department of Justice, received benefits under that finding for many, many years, and is entitled to rely upon that finding in subsequently seeking disability insurance benefits.

Respectfully Submitted,

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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED FEBRUARY 23, 1996

(Do Not Publish)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-2071
Non-Argument Calender

D.C. Docket No. 89-1700-CIV-T-17

HARRY E. PIERCE,

Plaintiff-Appellant,

versus

SHIRLEY S. CHATER,
Commissioner of Social Security,

Defendant-Appellee.

Appeal from the United States District court
for the Middle District of Florida
[Decided and Filed on] (February 23, 1996)

Before KRAVITCH, COX and BLACK, Circuit Judges.

PER CURIAM:

Harry E. Pierce appeals the judgment of the district court affirming the Commissioner's denial of his application for disability benefits. On appeal, Pierce raises the following issues: (1) whether receipt of benefits under the Federal Employees Compensation Act entitles him to Social Security disability benefits; (2) whether the administrative law judge properly considered the disability findings of the Department of Labor; and (3) whether the administrative law judge properly disregarded certain medical opinions of treating psychiatrists.

Our review of the record persuades us that the Commissioner's decision to deny Pierce disability benefits is supported by substantial evidence and was reached by a proper application of the law. We affirm the judgment of the district court.

AFFIRMED.

APPENDIX B

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA FILED NOVEMBER 14, 1994

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

HARRY E. PIERCE,

Plaintiff,

vs. CASE NO. 89-1700-CIV-T-17

DONNA E. SHALALA,

Defendant.
_____/

ORDER ADOPTING REPORT AND RECOMMENDATION

This cause is before the Court on report and recommendation issued by Magistrate Judge Elizabeth A. Jenkins, on October 28, 1994. The Magistrate Judge found that the Administrative Law Judge (ALJ) complied with this Court's remand order and she recommended that the decision of the ALJ, finding that Plaintiff was not under a "disability" as defined by the Social Security Act, be affirmed.

Pursuant to Rule 6.02, Rules of the United States District Court for the Middle District of Florida, the parties had

ten (10) days after service to file written objections to the proposed findings and recommendations, or be barred from attacking the factual findings on appeal. Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982) (en banc). The plaintiff filed his objections on November 8, 1994.

The Court has reviewed the report and recommendation as promulgated by the magistrate judge and as well as making an independent review of the file. The Court concurs with the recommendation made by the Magistrate Judge. Accordingly, it is

ORDERED that the report and recommendation, dated October 28, 1994, be **adopted** and **incorporated by reference**; the objections of the plaintiff (Docket No. 50) be overruled; the decision of the defendant to deny the plaintiff "disability" status under the Social Security Act be **affirmed**; and the Clerk of the Court be **directed** to enter judgment for the defendant consistent with this order.

DONE and ORDERED in Chambers, in Tampa, Florida, this 14th day of November, 1994.

/s/ ELIZABETH A. KOVACHEVICH
ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record
Assigned Magistrate Judge

APPENDIX C

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE ELIZABETH A. JENKINS

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

HARRY E. PIERCE,

Plaintiff,

vs. Case No. 89-1700-Civ-T-17C

DONNA E. SHALALA,
Secretary of Health
and Human Services,

Defendant.
_____/

REPORT AND RECOMMENDATION

Plaintiff brings this action pursuant to the Social Security Act (the Act), as amended, Title 42, U.S.C., 405(g) to obtain judicial review of the final decision of the Secretary of Health and Human Services (the Secretary)

denying claims for disability insurance benefits under the Act.[1]

On May 22, 1992, this court remanded this case to the Secretary for the limited purposes of considering the Department of Labor's disability determination. The prior Report and Recommendation, which was adopted by the District Court in its order, stated that:

> The decision of the Secretary denying benefits be reversed and the case be remanded for the purpose of considering the Department of Labor disability determination and all records pertinent to that determination which shall be disclosed by the Department of Labor to plaintiff for use in this proceeding.

(Dkt. 36, Prior R&R, p.4)

Upon remand, the ALJ held a supplemental hearing and received and incorporated into the evidence of record in this case, all pertinent documents and records made available by the Department of Labor. (Supp. T. 442). The ALJ found that the Department of Labor's disability determination did not suggest that plaintiff's impairments prevented sedentary work. The ALJ concluded that the Department of Labor standards are different from the standards used by the Social Security Administration to evaluate disability. The ALJ affirmed the prior findings that plaintiff retained the residual functional capacity to

---

[1] This matter has been referred to the undersigned by the District Judge for consideration and a report and recommendation. *See* Local Rule 6.01(b) and 6.01(c), M.D. Fla.

engage in a full range of sedentary work and denied the application for disability benefits. (Supp. T. 439-451).

Plaintiff appealed the ALJ's order contending that: 1) the ALJ did not properly respond to this Court's Remand Order to consider the Department of Labor's disability determination; and 2) the ALJ was not presented with all of the claimant's records and information available from the Department of Labor. (Dkt. 45). The Appeals Council affirmed the decision of the ALJ. (Supp. T. 427-428). Thereafter, a copy of the supplemental transcript was filed by the Secretary with this court.

A. Plaintiff contends that the Secretary did not properly respond to this Court's remand order to consider the Department of Labor's disability determination.

The ALJ's decision stated that since this Court's most recent remand order, no additional information concerning the disability standards employed by the Department of Labor had been received by him. (Supp. T. 442). Further, no formal decision or rationale has been entered into evidence with respect to the Department of Labor's disability determination of the plaintiff. (Supp. T. 446). The ALJ reviewed all of the pertinent evidence admitted in this case, including the information received from the Department of Labor, and concluded that the standards employed by the Department of Labor in making disability determinations must be different from those used by the Social Security Administration. (Supp. T. 446). The ALJ further noted,

that under the regulations, the disability determinations of another agency or Department of the U.S. Government are not binding upon the Social Security Administration. *See* 20 C.F.R. 404.1504. (Supp. T. 447-448).

The plaintiff argues that the ALJ did not properly respond to this Court's Order of Remand to consider the Department of Labor's disability determination. (Dkt. 45 p.2). The plaintiff further contends that the ALJ should have examined the standards of the Federal Employee's Compensation Act in considering this issue and argues that, had the ALJ done so, he would have found the definition of disabled essentially the same. (Dkt. 45 p.6).

The Secretary, on the other hand, contends that "disability" is determined and defined differently by the Department of Labor. Further, the Secretary provided this Court with statutory sections, regulations, and cases in its Supplemental Memorandum with regard to the standards applied by the Department of Labor in making disability determinations. Upon a general review of the Federal Employee's Compensation Act, applicable regulations, and citations provided by the Secretary, I find that the definition of disability and the determination of disability standards of the Department of Labor are different from those of the Social Security Administration.

Under the Social Security Act, "disability" is defined as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which lasted or can be expected to last for a continuos period of not less than 12 months. 42 U.S.C. 423(d)(1)(A). An individual shall be determined to be under a disability only if his/her physical or mental impairment or impairments are of such severity that he/she is not only unable to do his/her previous work but cannot, considering his/her age, education, and work experience, engage in any other kind of substantial gainful work ... . *See*

42 U.S.C. 423(d)(1)(B).

The Federal Employees Compensation Act (hereinafter FECA) defines "disability" as the incapacity, because of employment injury, to earn the wages the employee was receiving at the time of the injury. 20 C.F.R. 10.5(a)(17). In contrast, the Social Security Act does not require that the employee be capable of earning a wage comparable to the pre-injury wage. The FECA provides workers' compensation coverage for wage loss to federal civilian employees who are injured while in the performance of their duties. 5 U.S.C. 8102(a); *Woodruff v U.S. Department of Labor*, 954 F.2d 634, 636 (11th Cir. 1992). The grant of total disability under the FECA is apparently premised on the agency's determination of the total and complete disability of the recipient to perform his/her normal work. *Cunningham v United States*, 549 F.2d 753,760 (Ct. Cl. 1977); *Everett v United States*, 340 F.2d 352, 354-55 (Ct. Cl. 1965).

The procedure and standards for determining disability applied by the Department of Labor are essentially as follows:

1) An injured employee may receive "continuation of pay" at the same rate of pay for up to 45 calendar days of disability upon the proper filing of a Claim for Wage Loss with his immediate superior on a form approved by the Secretary of Labor. *See* 5 U.S.C. 8118; 20 C.F.R. 10.201. This is provided as an option because the employee is essentially not entitled to wage loss compensation for his disability until the disability exceeds 14 days. See 5 U.S.C. 8117(1).

2) Once a Claim for compensation for disability is filed it is processed by claims examiners at the Office of Workers' Compensation Program (OWCP). It is their duty to apply the law to the facts as reported, received, or obtained upon investigation. 20 C.F.R. 10.130. The Federal Employees Compensation Act requires that a decision with respect to entitlement contain findings of fact and be based on consideration of the claim presented by the claimant, the report of his immediate superior, and the completion of such investigation as the Office may deem necessary. 5 U.S.C. 8124(a)(1),(2); 20 C.F.R. 10.130. There is no required procedure for production of evidence but the evidence should be in written form. 20 C.F.R. 10.130. The employee has the burden of proof with regard to establishing the disability and the causal relationship to employment. See 20 C.F.R. 10.110(a).

3) After considering all the information provided or obtained, the Secretary of Labor makes a decision regarding the extent of disability and its causal relationship to the claimant's employment. If the claimant is found to have suffered a disability the Secretary will award compensation for wage loss based on the degree of disability found to be suffered by the claimant. The Secretary may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may end, decrease, or increase compensation previously awarded; or award compensation previously refused or discontinued. *See* 5 U.S.C. 8128(a)(1),(2).

4) The Secretary may issue a schedule award of

compensation for specified periods of time for permanent or partial loss or loss of use (referred to as impairment) of each of certain members, organs and functions of the body. *See* 20 C.F.R. 10,302(a). Compensation for loss of wage-earning capacity may be paid after the schedule expires.

In the case at bar, the plaintiff received "continuation pay" pursuant to 20 C.F.R. 10.201 from February 9, 1977 to March 25, 1977 after which he was paid wage loss compensation for temporary total disability. (Dkt. 41 p.1). In a report dated January 5, 1978, Dr. Lunseth opined that the plaintiff would probably be unable to return to his normal previous job and recommended job rehabilitation counseling. (Dkt. 41 p.1). Some months later, the Office of Workers' Compensation referred the plaintiff to the State of Florida's Office of Vocational Rehabilitation. After psychological testing and vocational counseling, it was determined that with 12 to 18 months of vocational retraining the plaintiff would be qualified for a general office clerk position. A vocational plan was agreed upon and begun by the plaintiff, but after one month of training the plaintiff dropped out of the program due to difficulties using the school's stairs because of his knee condition. (Dkt. 41 p.2-3).

The Office of Workers' Compensation subsequently issued a schedule award to the plaintiff on October 7, 1980 for a 36 percent permanent loss of use of his right leg, based on findings reported by Dr. Lunseth in an April 7, 1980 examination. The period of the award covered September 11, 1980 to September 6, 1982. This award was based on a partial disability or loss of the use of

member of the body. *See* 20 C.F.R. 10.304.

Temporary disability reimburses the employee for his temporary wage loss; a scheduled award compensates him for permanent loss of use of a bodily member or function. *Staacke v U.S. Secretary of Labor*, 841 F.2d 278, 281 (9th Cir. 1988). Compensation for loss of wage earning capacity may be paid after the schedule award expires. See 20 C.F.R. 10.304(a). In the instant case, the Department of Labor found the plaintiff was temporarily totally disabled for the purpose of wage-earning capacity, for his usual work, from March 25, 1977 to September 11, 1980. (Dkt. 41 p.1-3). From September 11, 1980 to September 6, 1982, the plaintiff received a schedule award compensating him for permanent partial loss of use of right lower extremity. (Exhibit 27, Dkt. 41 p.3). On October 16, 1982, Dr. Lunseth completed an Office of Workers' Compensation work tolerance limitations form, in which he indicated that the plaintiff could perform at a sedentary work position. (Dkt. 41 p.3). On January 11, 1983, the Office of Workers' Compensation Program reclassified the plaintiff as temporarily partially disabled for wage-earning capacity purposes effective January 17, 1983 based on his ability to perform the duties of an office clerk. (Dkt. 41 p.3). It is unclear what the plaintiff's compensation status was from September 7, 1982 to January 27, 1983.

Subsequent requests for reconsideration of the modification of plaintiff's wage loss status were denied by the Secretary of Labor. The plaintiff appealed to the Employee Compensations Appeals Board and the modification of the plaintiff's wage loss status was reversed

and ruled erroneous, because the plaintiff had not completed the vocational training required to qualify him as an office clerk. (Dkt. 41 p.6-7).

The Secretary argues, as aforementioned, that the determination of disability under the FECA is made once and employee cannot perform his usual work. *See Cunningham*, 549 F.2d at 760; *Everett*, 340 F.2d at 354-55. Further, the Department of Labor determination in January 1983 was not a medical determination; it was a vocational determination that the plaintiff could no longer perform his usual work but could presumably perform the job of an office clerk. This was based on a variety of factors many of which are not considered in the Social Security Act's definition of disability. (Dkt. 48 p.6).

The ALJ did not make specific findings or articulate the differences between the two agency's standards, and therefore, did not completely comply with the intent of the Order of Remand from this Court. However, the ALJ did address the records supplied by the Department of Labor and its actual findings in his decision. (Supp. T. 442-447). After reviewing the aforementioned statutes, regulations, and cases as well as the information provided by the Department of Labor, this Court finds that the ALJ's determination that the standards used by the Department of Labor for determining disability are significantly different than the standards used under the Social Security Act to be correct. As the ALJ points out, under the Social Security regulations, the disability determinations of another U.S. agency or department are not binding upon the Social Security Administration. *See* 20 C.F.R. 404.1504. However, in *Falcon v Heckler*, 732 F.2d 827

(11th Cir. 1984), this Circuit held that disability determinations of other agencies or departments of the U.S. Government must be given great weight unless there is good cause not to do so. The ALJ referred to this standard in his decision and found that the Department of Labor determination was entitled to no more than "ordinary weight" under the circumstances because the standards for evaluating disability were different. The ALJ found that the medical and other evidence in this case does not support a finding that the plaintiff is "totally disabled for all types of gainful employment," as determined by the Department of Labor in one report. Upon review, the Secretary did comply with this court's remand order and the decision is not contrary to law.[2]

B. Plaintiff also maintains that the Department of Labor failed to completely comply with this Court's order to release records sought by the plaintiff and thus, the ALJ was not presented with all of the plaintiff's records.

At the supplemental hearing held November 10, 1992, plaintiff contended that all of his records from the Department of Labor still were not in evidence. (Supp. T. 470-478). He further alleged that they had been willfully destroyed by an agent of the Department of Labor. (Supp. T. 472). However, plaintiff was unable to specify what

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[2] At oral argument in this case, plaintiff referred to an October, 1993 decision of the Department of Labor finding him disabled. This is not in the record. The administrative proceedings on remand concluded on July 14, 1993. Even if the Department of Labor did make additional findings, such evidence would be too remote in time considering plaintiff's date last insured of June 30, 1982. (Supp. T. 427-428).

records were missing, other than treatment records of Dr. Guest. There was no evidence submitted to substantiate his claim that records had been destroyed. (Supp. T.470-478).

The ALJ advised the plaintiff that all of the medical evidence available from Department of Labor had been incorporated into the record. Additionally, the ALJ allowed the plaintiff to submit additional evidence in the form of medical reports from the plaintiff's treating psychiatrist, Osberto B. Fernandez, M.D.. The ALJ also allowed the plaintiff to present lay witness testimony from the plaintiff's wife, brother, and son. (Supp. T. 27-33). The ALJ reviewed the new documentary evidence submitted by the Department of Labor appearing in the record as Exhibits 50 through 68. The new exhibits which dealt with the plaintiff's musculoskeletal complaints and psychological complaints were specifically enumerated in the ALJ's decision with specific findings regarding each one.

The ALJ found Exhibits 51 through 53 dealt with the plaintiff's musculoskeletal complaints prior to the date last insured. However, he found them to be cumulative or a duplication with respect to evidence previously submitted by plaintiff in this case. (Supp. T. 442). The ALJ found that Exhibits 55, 56, 59, 61, 62, and 64 dealt with treatment of plaintiff's musculoskeletal complaints for our or more years after the date of last insured, and cannot reasonably be used to infer the claimant's medical condition prior to the date last insured. (Supp. T. 442). Exhibit 68 was found to be a duplicate of Exhibit 52.

Finally, the ALJ found that the remainder of evidence

submitted into the record, Exhibits 50, 54, 57, 58, 60, 63 and 66 dealt with plaintiff's psychological condition. (Supp. T. 443). He found that Exhibit 54, an October 25, 1978 report of a psychological examination conducted for the Department of Labor for Vocational Rehabilitation purposes, established that the plaintiff retained the mental capacity to successfully engage in rehabilitative vocational training. (Supp. T. 443). The ALJ examined Exhibit 57, a July 26, 1989 psychiatric evaluation which referenced a letter by Maurice C. Guest, M.D., who treated the plaintiff from 1963 to 1982. The letter expressed the opinion that the plaintiff was physically and mentally unable to engage in gainful employment up until 1982 when Dr. Guest retired. It also indicated that he recommended psychotherapy to the plaintiff in 1977 but the plaintiff rejected that idea. (Supp. T. 575). The ALJ also noted that Dr. Guest's letter stated he treated plaintiff for "minor problems" consisting primarily of gastrointestinal and recurrent arthritic pain. (Supp. T. 278, 444). The ALJ concluded that the record did not appear to reflect any significant psychological complaints during the period of 1977 to 1982 which were discussed in Dr. Guest's letter. The ALJ further noted that the psychiatrist expressed the opinion that the plaintiff did not suffer from a psychiatric condition which required treatment, or which was related to physical problems arising prior to the date last insured. (Supp. T. 444, 578).

The ALJ found Exhibit 58, a letter dated June 28, 1990 from Paul A. Lunseth, M.D., to be a duplicate of Exhibit 36, previously reviewed by ALJ Lockwood and thus, it did not directly fall within the limited scope of this Court's order of remand. The ALJ found that Exhibit 60, a report of a January 30, 1992 psychiatric examination of

the plaintiff was not relevant because it assessed the plaintiff's psychological condition as of the date of the examination and did not relate back in time to the date the plaintiff was last insured. (Supp. T. 444).

Exhibits 50, 63, and 66 are reports from Osberto B. Fernandez, M.D., the plaintiff's treating psychiatrist since June 21, 1989. Dr. Fernandez' opinion was that the plaintiff is suffering from a major depressive disorder that dates back to a time prior to 1982. This opinion was based on his review of medical reports prior to 1982 which were provided by the plaintiff. (Supp. T. 541). However, the ALJ gave Dr. Fernandez' opinion little weight because he did not specifically describe the records upon which his opinion was based and, it was not supported by other evidence of record. (Supp. T. 445).

Medical evidence of a plaintiff's condition subsequent to the expiration of insured status may bear on the severity of the plaintiff's condition before the expiration of insured status. *See e.g. Basinger v Heckler*, 725 F.2d 1166, 1169-70 (8th Cir. 1984); *see also Boyd v Heckler*, 704 F.2d 1207, 1211 (11th Cir. 1983) (a treating physician's opinion is still entitled to significant weight notwithstanding the failure to treat plaintiff until after the relevant determination date), superseded by statute on other grounds as stated in *Hand v Heckler*, 761 F.2d 1645 (11th Cir. 1985). Medical opinions are entitled to persuasive weight only insofar as they are supported by clinical or laboratory finds or other medically accepted evidence. *See* 20 C.F.R. 404.1527, Reg. 4; 20 C.F.R. 416.927, Reg. 16. Therefore, it is within the ALJ's discretion to reject the opinion of any physician, even a treating physician, when the weight of the

evidence supports a contrary conclusion. *Oldham v Schweiker*, 660 F.2d 1078, 1084-1086 (5th Cir. 1981). The ALJ's decision to give Dr. Fernandez' opinion little weight was based on the lack of specificity with regard to what medical reports dated prior to 1982 that he relied on, and no articulation as to what those reports indicated. The plaintiff apparently provided Dr. Fernandez with the medical reports on which he based his opinion. (Supp. T. 541). This Court agrees with the ALJ's finding that the medical reports that have been entered into evidence in this case do not support that opinion. The plaintiff alleges that all of his medical records have not been admitted into evidence and that the Department of Labor did not completely comply with this Court's Order to cooperate. (Supp. T. 470-478). The plaintiff has failed to substantiate his claim that records held by the Department of Labor had been destroyed. Furthermore, it appears from the record, that the plaintiff was in possession of the medical records on which Dr. Fernandez based his opinion at some point in time, and Dr. Fernandez was in possession of these records as well. (Supp. T. 541). Yet, the plaintiff has failed to produce these records and submit them into evidence in this case.

Conclusion

The Secretary properly complied with this court's remand order. The decision of the ALJ that the plaintiff was not under a "disability," within the meaning of the Social Security Act as amended, at any time on or before June 30, 1982, when he last met the disability insured status requirements of the Act, is supported by substantial and competent evidence and should be affirmed.

It is therefore RECOMMENDED that:

(1) The decision of the Secretary be affirmed.

/s/ ELIZABETH A. JENKINS
ELIZABETH A. JENKINS
United States Magistrate Judge

Dated: October 28, 1994.

NOTICE TO PARTIES

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal. 28 U.S.C. 636(b)(1).